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Facing China: Taiwan's Status as a Separate Customs Territory in the World Trade Organization

Pasha L. HSIEH*

I. INTRODUCTION

A defining date in Taiwan's diplomatic and economic history was 11 November 2001. In Doha, Qatar, the Fourth Ministerial Conference of the World Trade Organization (WTO) unanimously approved Taiwan's application for WTO membership, just 24 hours after approving China's admission.¹ After Taiwan's Congress ratified the country's entry protocol and the government deposited relevant agreements in the Secretariat in Geneva,² Taiwan became the 144th WTO Member as the "Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu", abbreviated as "Chinese Taipei", on 1 January 2002.³

Taiwan's choice of this tedious title in the WTO, instead of its official name, Republic of China (ROC), shows its reluctant compromise with political reality. Taiwan's trade volume places it among the top 10 percent of that of all WTO Members. Nonetheless, it took Taiwan 12 years of strenuous efforts to enter this "United Nations of Economics and Trade" since submitting its accession application in 1990.⁴ In fact, most of Taiwan's agreements were completed by late 1999, but because of China's insistence that Taiwan can only accede to the WTO after its entry and

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¹ Mark O'Neill, *China Signs WTO Agreement; US President Welcomes Accession of Mainland and Taiwan as Engine for Global Economic Growth*, South China Morning Post, Hong Kong, 12 November 2001, p. A1; Chi Chin-ling and Maubo Chang, *Taiwan Inks WTO Entry paper*, Central News Agency (Taiwan), 13 November 2001, available at Lexis, News Library, Allasi File; Sofia Wu, *WTO Entry Marks New Milestone in ROC's Return to World Stage*, Central News Agency (Taiwan), 12 November 2001, available at Lexis, News Library, Allasi File.

² For discussions on the procedure of accession to the WTO, see John H. Jackson, W.J. Davey and A.O. Sykes Jr (eds), *Legal Problems of International Economic Problems, Cases, Materials, and Text* (4th edn, St Paul, MN: West Group, 2002), pp. 233–234.

³ See *ibid.*, p. 1227 ("China announced that it would immediately deposit its formal acceptance of the WTO Agreement. As such, Chinese membership became effective on December 11, 2001. Chinese Taipei's membership became effective on January 1, 2002. The WTO will then have 144 members.").

⁴ Chi Chin-ling and Bear Lee, *WTO Approves Taiwan's Membership Application*, Central News Agency (Taiwan), 11 December 2001, available at Lexis, News Library, Allasi File.

because most countries were concerned about trade relations with China, Taiwan's accession progress was postponed.⁵

Taiwan's accession to the WTO is considered to be the most important diplomatic breakthrough. The government believes that WTO will enable Taiwan to open a new "window of the century" and a "window of the world".⁶ Section II of this article describes Taiwan's application to the WTO and its status as a separate customs territory. Section III introduces how WTO membership benefits Taiwan. Section IV analyses cross-strait trade laws and policies of China and Taiwan. Section V examines interactions between China and Taiwan in the WTO and potential violations of international trade law they may trigger.

II. TAIWAN AND THE WTO

A. THE ROC AS A FOUNDING MEMBER

In 1946, in order to rebuild the shattered world economy after the Second World War, the United Nations adopted a resolution calling for the establishment of the "International Trade Organization" (ITO) and the United States subsequently drafted the Charter of the ITO.⁷ From April to October 1947, the full preparatory conference convened in Geneva where nations continued discussing the Charter of the ITO as well as negotiated multilateral tariffs concessions.⁸ The Republic of China, then on Mainland China, became one of the 23 contracting parties of the General Agreement on Tariffs and Trade (GATT) concluded at the Geneva Conference by signing the Final Act of the GATT on 30 October 1947.⁹ Because some nations require parliamentary ratification to implement the GATT obligations, the GATT was not applied until all contracting parties, except Chile, signed the Protocol of Provisional

⁵ See, e.g., William Dullforce, *Taiwan's Bid to Join GATT Hands World Trading Body a Hot Potato*, Financial Times (London), 5 January 1990, p. A3 ("Chinese officials have argued that it was impossible for GATT to contain two Chinas. Taiwan could join only after China itself had become a member and then only under [Beijing's] sponsorship—a procedure similar to that under which Hong Kong joined GATT under UK sponsorship"); WTO Successfully Concludes Negotiations on China's Entry, 17 September 2001, at <http://www.wto.org/english/news_e/pres01_e/pr243_e.htm> ("All contracting parties had acknowledged . . . that Chinese Taipei, as a separate customs territory, should not accede to the GATT before the PRC itself."); see also Doug Bandow, *Let Taiwan enter the WTO first*, Taipei Times, 19 January 2001, p. A12 ("With China lagging behind, there is no justification for holding up Taipei's membership application.").

⁶ Chen Shui-bian, Statement on the ROC's Accession to the World Trade Organization, Government Information Office, 12 November 2001, available at <<http://www.gio.gov.tw/taiwan-website/4-0a/20011112/2001111201.html>>.

⁷ John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd edn, The Hague and Boston: Kluwer Law International, 1999), pp. 36–37.

⁸ *Ibid.*, p. 37.

⁹ General Agreement on Tariffs and Trade, 30 October 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. Twenty original contracting members include Australia, Belgium, Brazil, Burma, Canada, Ceylon (now Sri Lanka), Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, South Africa, Southern Rhodesia, Syria, the United Kingdom, and the United States. Yang Guohua and Cheng Fin, *The Process of China's Accession to the WTO*, 14 J. Int'l Econ. L. 2 (2001), p. 297.

Application (PPA).¹⁰ The ROC provisionally applied the GATT after it signed the PPA on 21 May 1948.¹¹

For the initial purposes of embodying trade negotiations and including protective clauses, the GATT was never designed to be an organization.¹² Nevertheless, since the US Congress refused to approve the Charter of the ITO and thus the ITO never came into existence,¹³ the GATT essentially became the only “organization” to manage global trade.

B. THE ROC'S WITHDRAWAL AND THE PRC'S “RESUMPTION”

Soon after the Communist Party founded the People's Republic of China (PRC), the defeated ROC government, led by the Nationalist Party (Kuomintang), moved its seat to Taiwan in 1949. On 6 March 1950, the ROC on Taiwan notified the UN Secretary-General of its decision to withdraw from the GATT.¹⁴ Several considerations were behind the ROC's decision. First, most commodities that gained GATT tariff concessions came from Mainland China and only a few from Taiwan; thus maintaining the membership would not benefit Taiwan's economy.¹⁵ Second, the ROC was informed that GATT contracting parties would not adopt the favourable tax rate for Taiwan.¹⁶ Third, Taiwan's trade volume was very small in the 1950s, and even without GATT membership, Taiwan could still obtain preferential tariffs deduction through bilateral trade agreements with its major trade partners.¹⁷ Finally, the ROC could not fulfil GATT obligations on behalf of the mainland and it would greatly disadvantage Taiwan to be held responsible for a territory that it no longer controlled.

Only Czechoslovakia challenged the validity of ROC's withdrawal in 1950 on “China's” behalf.¹⁸ When the ROC applied for observer status in GATT in 1965, 13 countries that switched recognition to the PRC opposed Taiwan's application.

¹⁰ Jackson, as note 2 above, p. 223; see Ya Qin, *China and GATT—Accession Instead of Resumption*, 27 J.W.T. 2 (April 1993), pp. 77, 79 (“Chile became a GATT contracting party afterwards through accession in February 1948”).

¹¹ GATT: Status of Legal Instruments, GATT/LEG/1, Supp. No. 13, April 1988, pp. 1–2.3.

¹² Jackson, as note 2 above, p. 212. For instance, states are called “contracting parties” in the GATT, but are called “Members” in the WTO.

¹³ See *ibid.*, p. 213 (“The composition of Congress had shifted to a stance less liberal on trade matters and less internationally oriented. Recognizing the inevitable, in December 1950, the Executive Branch announced that it would not re-submit the ITO charter to Congress for approval, so for all practical purposes the ITO charter was dead.”).

¹⁴ Communication from Secretary-General of the United Nations Regarding China, GATT Doc. CP/54 (Mar. 6, 1950). See Qin, as note 10 above, p. 79, n. 13 (“The withdrawal took effect on 5 May 1950, 60 days after the notice, in accordance with Article 5 of the PPA.”).

¹⁵ Yang and Chen, as note 9 above, p. 298. Some commentators also argue that the ROC's decision was to refrain it from being expelled involuntarily and prevent the PRC from entering the GATT. *Ibid.*; Lori Fisler Damrosch, *GATT Membership in a Changing World Order: Taiwan, China, and the Former Soviet Republics*, Colum. Bus. L. Rev. (1992), pp. 19, 21.

¹⁶ *Ibid.*

¹⁷ Ying-jeou Ma, *The ROC(Taiwan)'s Entry into the WTO: Progress, Problems and Prospects*, 15 Chinese YB of Int'l & Aff. (1996–97), p. 36.

¹⁸ Chung-chou Li, *Resumption of China's GATT Membership*, 21 J.W.T. (1987), pp. 25, 26.

Taiwan's observer status was granted since the ROC still held the old China seat in the UN.¹⁹ However, in 1971, the UN passed Resolution 2758, which decided to:

“... restore all its rights to the People's Republic of China and to Recognize the Representative of its Government as the only legitimate representative of China to the United Nations, and to expel forthwith the representative of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it.”²⁰

In the same year, the GATT declared that it would “follow the decisions of the United Nations on political matters”.²¹ Thus, Taiwan's observer status was deprived.

Whether or not the ROC's withdrawal from the GATT is binding on the PRC remains a myth of international law. The PRC did not have contact with the GATT until 1982 when its delegation joined the Multi-Fibre Arrangement (MFA) and later in 1982 when it attended the GATT Contracting Parties meeting as an observer.²² The PRC consistently asserted that the founding of the PRC in 1949 did not alter China's status as a subject of international law and the withdrawal from GATT in 1950 by the deposed regime in Taiwan was “illegal and invalid”.²³ Therefore, the PRC insisted on the “resumption approach” that its status should be an “original contracting party” to the GATT, rather than a new member.²⁴

The PRC's “presumption approach” is problematic for various reasons. First, the updated tariff schedule was fundamentally different from that of 1948 when “China” was a party. Contracting parties never anticipated that new tariff concessions would apply between them and China, which had had no contact with the GATT for more than 30 years. Second, contracting parties would not be able to invoke “opt out” or “non-application” provisions under Article XXXV²⁵ under which a party is entitled to refuse to apply all of its GATT obligations to a new member entering the GATT under Article XXXIII. The inability to invoke Article XXXV against China would particularly affect the United States. The Jackson-Vanik Amendment to the US Trade Act of 1974 imposed restrictions on granting most-favoured-nation (MFN)

¹⁹ Id.

²⁰ U.N. GAOR, 26th Sess., U.N. Doc. A/8429 (1971).

²¹ GATT Doc. SR. 27/2 (19 November 1971).

²² Yang and Chen, as note 9 above, p. 301.

²³ Qin, as note 10 above, p. 81.

²⁴ Ibid. See Yang and Chen, as note 9 above, p. 301 (“In November 1982, the PRC for the first time sent a delegation to attend the 38th GATT Contracting Parties Conference as an observer. There, the Chinese delegates pointed out in a speech that ‘China is one of the original Contracting Parties of the GATT.’ ... Then the delegates of China had an exchange of views with the GATT secretariat on some legal problems of ‘China’s resumption of the status as a Contracting Party’”; Harold K. Jacobson and Michael Oksenberg, *China’s Participating in the IMF, the World Bank, and GATT: Toward a Global Economic Order* (Ann Arbor, MI: University of Michigan Press, 1989). P. 89 (stating that China “recognized that conditions had changed substantially since 1950 and that the members of GATT had made many reciprocal concessions since then. China would be willing to negotiate the conditions of its full participation in GATT and to sign a protocol of accession”).

²⁵ See GATT Article XXXV (“This Agreement ... shall not apply as between any contracting party and any other contracting party if ... (b) either of contracting parties, at the time either becomes a contracting party, does not consent to such application ...”).

treatment to non-market-economy countries, including China.²⁶ However, the law was in violation of Article I MFN provision, mandating that “any advantage, favor, privilege or immunity granted by any contracting party . . . shall be accorded immediately and conditionally to . . . all other contracting parties”.²⁷ In other words, should China “resume” its status as original contracting party, the United States could no longer invoke the law barring the MFN application to China. Finally, from an international law perspective, even presuming that the ROC’s withdrawal has no effect on “China”, the long-term non-application between the PRC and contracting parties had led to “suspension” or “termination” of the GATT based on the Vienna Convention on the Laws of Treaties.²⁸ As a result, Professor John H. Jackson, a leading trade law scholar, concluded, “it was agreed that for the PRC’s ‘reentry’ into the GATT, the accession procedures would be used”.²⁹

C. SEPARATE CUSTOMS TERRITORY OF TAIWAN IN THE WTO

After the PRC notified the Director-General of the GATT requesting resumption of its status as an original contracting member on 10 July 1986,³⁰ the ROC on Taiwan filed its application for membership with the GATT under Article XXXIII of the GATT under the name of “Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu” (TPKM) on 1 January 1990.³¹ Given Taiwan’s complicated international status, choosing this tedious name serves two major purposes. First, using the name could avoid the political issue involving sovereignty, known as the “one China” problem.³² It was simply an illusion that the GATT would accept Taiwan under its official name, “Republic of China”. Second, applying as a “Separate Customs Territory” shows that the ROC is the government which has effective autonomy over Taiwan, and its outlying islands, Penghu, Kinmen and Matsu and the government has

²⁶ Jackson, as note 2 above, p. 237; Jacobson and Oksenberg, as note 24 above, p. 95; see also *PNTR—The Next Step for the United States*, China Bus. Rev. (January–February 2000), available at <<http://www.chinabusinessreview.com/public/0001/wtoptnr.html>> (“This amendment was originally directed at the Soviet Union because of restrictions on emigration of certain Soviet citizens. But the Jackson–Vanik amendment applies to all non-market economies. Thus, for the United States to enjoy WTO benefits with respect to China after PRC accession, Congress must amend or repeal Jackson–Vanik to permit extension of PNTR to China.”); House Report 106–632, *Permanent Normal Trade Relations with the People’s Republic of China*, available at <http://thomas.loc.gov/cgi-bin/cpquery/?&db_id=cp106&r_n=hr632.106&sel=TOC_46883&> (stating that President’s waiver “may be disapproved through passage by Congress of a joint resolution of disapproval within 60 calendar days after the expiration of the previous waiver authority. Congress may override a Presidential veto within the later of the end of the 60 calendar day period for initial passage or 15 legislative days after the veto.”).

²⁷ GATT Article I.

²⁸ See Qin, as note 10 above, pp. 87–89 (explaining the legal effects of suspension and termination of treaties).

²⁹ Jackson, as note 2 above, p. 236.

³⁰ Yang and Cheng, as note 9 above, p. 302.

³¹ Hungdah Chiu, *Taiwan’s Membership in the General Agreement on Tariffs and Trade*, 10 Chinese YB Int’l L. & Aff. (1990–91), p. 201.

³² Although Professor Hungdah Chiu pointed out that the ROC did not intend to use the name “Taiwan” alone in its application because this would imply that Taiwan is a country independent of the Chinese mainland, which is both contrary to the ROC national policy of unification and provocative to the PRC, *ibid.*, it is certainly not the case in current pro-independence Taiwanese leaders’ eyes.

independent external relations and, most importantly, can act on its behalf rather than depending on the PRC's approval.

According to its "one China" principle, the PRC fiercely opposed Taiwan's application for GATT membership. Hou Zhitong, the PRC's representative to the GATT, wrote to Director-General of the GATT Arthur Dunkel, arguing that Taiwan's application was "utterly illegal" and should not be considered.³³ On 19 October 1989, the spokesman of the PRC Ministry of Foreign Affairs stated that after the "restoration" of Chinese membership in the GATT, there might be a possibility for Taiwan to join the GATT.³⁴ From the PRC's standpoint, Taiwan is a province of China or a would-be "Special Administrative Region" as Hong Kong and Macau; thus Taiwan's application as a Separate Customs Territory was considered "invalid *de jure*" without a proper "confirmation of the PRC government".³⁵ Furthermore, the PRC feared that surrendering its sovereignty over the Taiwan issue to the world trade body would constitute foreign interference with China's domestic affairs and thus promote Taiwan's independence.³⁶

Contrary to the PRC's assertion, I argue that the status of Taiwan under the GATT is inherently different from that of Hong Kong. Requirements for GATT membership are different from those for most international organizations. While the latter generally require "states", the GATT requires "governments". Article XXXII clearly states that "... the contracting parties to this Agreement shall be understood to mean those governments".³⁷ Two articles of GATT, Article XXVI and Article XXXIII, govern governments' accession. It may seem subtle from the differences between their abbreviations: "Chinese Taipei" and "Hong Kong, China". However, the distinction can be demonstrated by the fact that Hong Kong gained GATT membership under Article XXVI(5) through the United Kingdom's sponsorship, but Taiwan's application as a new member was based on Article XXXIII.

Article XXVI(5)(a) states that "each government accepting the Agreement does so in respect of its metropolitan territory and of the other territories for which it has international responsibility",³⁸ and Article XXVI(5)(c) provides that "any of the customs territories ... possesses or acquires full autonomy in the conduct of external

³³ Ibid.; see also Susanna Chan, *Taiwan's Application to the GATT: A New Urgency with the Conclusion of the Uruguay Round*, 2 Ind. J. Global Legal Stud. 1 (Fall 1993), pp. 275, 284 (stating the PRC's position that "(1) there is one china, (2) the PRC government is the official government of China, (3) the ROC's application contravenes these beliefs").

³⁴ Chiu, as note 31 above, p. 202.

³⁵ Lei Wang, *Separate Customs Territory in GATT and Taiwan's Request for GATT Membership*, 25 J.W.T. 5 (October 1991), pp. 17, 19.

³⁶ See Chan, as note 33 above, p. 285 (stating that the PRC feared that "acceptance of the ROC's application will promote international recognition of the ROC as the legitimate government of China" and that "reunification between Taiwan and China would become even more remote if the GATT recognizes the strength of Taiwan's economy"); Charles Wolf Jr. et al., *Fault Lines in China's Economic Terrain* (RAND, 2003), p. 160 (arguing that "from the PRC's standpoint, continuance of the status quo, including Taiwan's admission to the WTO as a customs entity, may enhance Taiwan's de facto stature as an independent state").

³⁷ GATT Article XXXII.

³⁸ GATT Article XXVI(5)(a).

commercial relationships shall, upon sponsorship through a declaration by the responsible contracting party, ... be deemed to be a contracting party".³⁹ These provisions generally apply to countries, which were colonies of a contracting party and later gained independence.⁴⁰ The parent state applied for, or "sponsored", GATT memberships on behalf of its colonies.

Under this article, the United Kingdom, as Hong Kong's metropolitan power, sponsored Hong Kong for GATT membership in its own right. Hong Kong thus became a contracting party on 23 April 1986.⁴¹ In addition, the PRC confirmed that Hong Kong would continue to possess full autonomy in its external commercial relations in compliance with Article XXXVI requirements after the reversion of Hong Kong to China in 1997.⁴² Beijing accepted the continuation of Hong Kong's GATT separate membership due to the acknowledgment of the PRC's sovereignty over Hong Kong. Macau's status in the GATT was also based on a similar arrangement between China and Portugal.⁴³

Taiwan is Hong Kong or Macau neither in fact nor in law. Taiwan is by no means a colony and does not need a "metropolitan power" to sponsor its application for GATT membership.⁴⁴ Taiwan's legal basis is Article XXXIII. As "a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for [under the GATT]", the ROC government shall, and is entitled to, apply for membership "on its own behalf to or on behalf of [its] territory".⁴⁵ I call this article international trade law's Montevideo Convention. The issue now is who can join the club. Taiwan, as Article XXIV(2) defines a customs territory, certainly has "separate tariffs or other regulations of commerce", and maintains "a substantial part of trade" with other countries.⁴⁶ Taiwan's tariffs and laws, as well as its external relations, are not subject to the PRC's "confirmation". Moreover, diplomatic recognition is not an obstacle to bar Taiwan's membership because contracting parties are "concerned only with what [is] relevant to

³⁹ GATT Article XXVI(5)(c).

⁴⁰ Jackson, as note 2 above, p. 232; see also *ibid.*, pp. 232–233 ("[T]he sponsored new member would apply the General Agreement as its parent sponsor was applying it on the date of sponsorship ...").

⁴¹ Li, as note 18 above, p. 43.

⁴² See also *ibid.* (stating that according to the UK–PRC Agreement, the PRC promised that "the Hong Kong Administrative Region shall be a separate customs territory. It may practice in relevant international organizations and international trade agreements", including the GATT).

⁴³ *China's Accession to the WTO and its Relationship to the Chinese Taipei Accession and to Hong Kong and Macau, China*, March 2001, available at <http://www.wto.org/english/thewto_e/acc_e/chinabknot_feb01.doc> (discussing that Macau acceded to the GATT based on Portugal's sponsorship in accordance with Article XXVI:5(c) and China agreed to maintain Macau's autonomy in exercising foreign trade relations after China "resume the exercise of sovereignty over Macau").

⁴⁴ See Chan, as note 33 above, p. 286 ("Unlike Hong Kong, Taiwan has never been in the GATT as a colony or dependent territory represented by its suzerain state; in view of the different economic and trade systems on the two sides [of the Taiwan Strait], it is inappropriate for the mainland to accede on Taiwan's behalf when its seat is restored in the GATT.").

⁴⁵ GATT Article XXXIII.

⁴⁶ GATT Article XXIV.

the General Agreement”, and not the “status of international law”.⁴⁷ Therefore, the PRC’s claim that Taiwan’s accession depends on China’s sponsorship was baseless under international law. This proposition also supports my previous argument that Taiwan is not a part of the PRC and the PRC, as one side of the divided China, cannot represent the ROC.

On 29 September 1992, the GATT Council established a working party to examine Taiwan’s application.⁴⁸ The compromise regarding Taiwan’s status was reached in September 1992 when the chairman at the GATT Council meeting declared that:⁴⁹

“All contracting parties *acknowledged* the view that there is only one China ... [and M]any contracting parties, therefore, agreed with the view of the People’s Republic of China (PRC) that *Chinese Taipei, as a separate customs territory, should not accede to the GATT before the PRC itself* ... [T]he Council should examine the report of the Working Party on China and adopt the Protocol for the PRC’s accession before examining the report and adopting the Protocol for Chinese Taipei, while noting that *the working party reports should be examined independently.*” (emphasis added)

At the end of the Uruguay Round of trade negotiations in 1994, GATT contracting parties signed the Agreement Establishing the World Trade Organization (WTO Agreement).⁵⁰ A new organization, the WTO, was created to manage GATT and other trade-related agreements.⁵¹ The WTO followed the GATT’s “decisions, procedures, and customary practices”.⁵² Therefore, on 1 January 1995, Taiwan changed the legal authority under which its application was made from Article XXXIII of the GATT to Article XII of the WTO Agreement⁵³ and the GATT working party thus was changed to the WTO working party.⁵⁴

During the 12-year painstaking marathon of its membership application, Taiwan completed bilateral negotiations with 30 WTO Members and the working party on Chinese Taipei’s accession conducted eleven official meetings and four official meetings.⁵⁵ The WTO Ministerial Meeting approved Taiwan’s application on 11 November 2001,

⁴⁷ GATT SR 19/12 1961, 195–961; see also Cho Hui-Wan, *Taiwan’s Application to GATT/WTO: Significance of Multilateralism for an Unrecognized State* (New York: Praeger, 2002), p. 175 (discussing the background of this statement).

⁴⁸ Background Information on Taiwan’s WTO Application, Board of Foreign Trade, 13 November 2001, at <<http://www.gio.gov.tw/taiwan-website/4-oa/wto/wtoacc.htm>>.

⁴⁹ Analytical Index, Guide to GATT Law and Practice 943–44 (GATT/WTO: 1994).

⁵⁰ *Legal Texts: WTO Agreement*, available at <http://www.wto.org/english/docs_e/legal_e/final_e.htm> (4 March 2005); see Jackson, as note 2 above, p. 219 (discussing the differences between the ITO and the WTO).

⁵¹ The WTO structure consists of the WTO Charter, Annex 1 multilateral agreements (Annex 1A the GATT of 1994, Annex 1B General Agreement on Trade in Services (GATS), and Annex 1C Agreement on Trade-Related Aspects of Intellectual Property (TRIPs)), Annex 2 dispute settlement rules, Annex 3 rules governing the Trade Policy Review Mechanism (TPRM), and Annex 4 optional agreements. Jackson, as note 2 above, pp. 219–220.

⁵² Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, Article XVI(1), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) (hereinafter WTO Agreement).

⁵³ See WTO Agreement Article XII (stating that the WTO membership is open to “any state or separate customs territory”).

⁵⁴ WTO document WT/ACC/TPKM/1, January 1995.

⁵⁵ The ROC’s Accession to the WTO, Ministry of Foreign Affairs, available at <<http://www.mofa.gov.tw/fp.asp?xItem=10685&ctnode=292>> (last visited 30 July 2004).

and the next day, ROC Economic Affairs Minister Lin Hsin-yi signed the accession protocol.⁵⁶ On 8 March 2002, WTO Director-General Mike Moore met Yen Ching-Chang, Taiwan's first WTO representative, and Taiwan's WTO permanent mission was officially established.⁵⁷

D. WTO: ANOTHER DIPLOMATIC BATTLE BETWEEN TAIWAN AND CHINA

After China became the 143rd Member and Taiwan became the 144th Member,⁵⁸ the WTO became another diplomatic battle for these "two Chinas". It is noteworthy that the PRC's attitude toward Taiwan's accession to the global trade organization changed from opposition to Taiwan's GATT membership to a position that "Taiwan can only accede to the WTO after the PRC's entry". There are several reasons underlying the policy change. First, Taiwan's entry to the WTO is inevitable since major trading powers would gain great economic benefits from Taiwan's accession, such as opening its agriculture and services market and lowering its protective tariffs. China and Taiwan are the World's 5th and 14th largest exporters, and 6th and 16th largest importers, respectively.⁵⁹ As both states are important economies, it is not of interest to WTO Members to accept China at the cost of sacrificing Taiwan. Second, as WTO membership is not only open to a "state", but also a "separate customs territory", the PRC can interpret Taiwan's WTO status as that of Hong Kong and Macau, which is consistent with the "one China" principle. For these reasons, China often translated "Chinese Taipei" into Chinese as "China Taipei" whereas Taiwan translated the name as "Chunghua Taipei". In fact, from the PRC's stance, the "one county, four seats" formula has become the "one country, two systems" version under the WTO. Finally, the PRC may push Taiwan to open "three-links",⁶⁰ i.e., direct trade, shipping transportation, and postal services under the WTO framework and thus achieve the purpose of "promoting reunification through economic integration".

Coexistence of two political rivals in the WTO is never easy. China sees Taiwan's every move as a step towards "proof of independence". Taiwan, on the contrary, tries

⁵⁶ Chi and Chang, as note 1 above. Taiwan sent the notification of the accession protocol ratification to the WTO on 2 December 2001 and although the day was a Sunday, WTO agreed to accept it to facilitate Taiwan's admission. Sofia Wu, *Taiwan will Deposit WTO Accession Accord*, Central News Agency (Taiwan), 18 November 2001, available at Lexis, News Library, Allasi File.

⁵⁷ Information on the website of the Permanent Mission of Taiwan to the WTO, at <http://www.taiwanwto.ch/about_mission/history.html> (last visited 16 August 2004).

⁵⁸ See Jackson, as note 2 above, p. 219 ("China announced that it would deposit its formal acceptance of the WTO Agreement. As such, Chinese membership became effective on 11 December 2001. Chinese Taipei's membership became effective on January 1, 2002."); According to ROC law, treaties should be ratified by the Congress (Legislative Yuan).

⁵⁹ *According to WTO Report, Taiwan Exports Ranks 14th-largest in 2002*, Taiwan News, Central News Agency (Taiwan), 7 November 2003, available at Lexis, News Library, Allasi File.

⁶⁰ See, e.g., Article 29, Act Governing Relations Between Peoples of the Taiwan Area and the Mainland Area, available at <<http://www.mac.gov.tw/english/index1-e.htm>> (last visited 20 February 2005) (hereinafter Cross-Strait Act) ("Unless permitted by the competent authorities, no Mainland vessels, civil aircraft or other means of transportation may enter into the restricted or prohibited waters of the Taiwan Area or the controlled airspace of the Taipei Flight Information Region.").

to “politicize and internationalize” trade issues in order to prove the autonomy of its government separate from China. China consistently attempts to downgrade Taiwan’s status in the WTO. In 1999, after Taiwan’s application for WTO membership gained widespread support, the PRC proposed to add “China’s” to the name “Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu”.⁶¹ Again, in 2000, the PRC submitted proposed language to its working party stating “Taiwan is a separate customs territory of China”.⁶² The PRC did not succeed due to most Members’ opposition.⁶³ Even after Taiwan’s entry into the WTO, in February 2003, as a direct result of the PRC’s pressure, WTO Director-General Supachai Panitchpakdi demanded that Taiwan mission change the name from “Permanent Mission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu” to “economic and trade office”, parallel to the title used by Hong Kong and Macau, claiming that Taiwan’s current title has “sovereignty implications”.⁶⁴ Until now, Taiwan’s current title as the “permanent mission” remained unchanged. However, because of the name dispute over Taiwan’s title, the WTO has not updated the correspondence directory, also known as the “blue book”, since February 2002.⁶⁵ The WTO Secretariat used to specify the origin of submitted documents by “permanent mission”.⁶⁶ It is suggested that in order not to get involved in the name dispute, the WTO Secretariat now use “delegation”, instead of “permanent mission”.⁶⁷

China’s request was not legally justified for the following reasons. First, China’s demand was based on statements with respect to Taiwan’s status made by the 1992 GATT Council chairman that Taiwan’s representation “would be along the same lines as that of Hong Kong and Macau” and its title “would not have any implication on the issue of sovereignty”.⁶⁸ However, the Council never adopted this statement. Instead, the Council simply indicated, as the minutes show, that “the Council took note of the statement”.⁶⁹ As mentioned above, the term “took note of”, like “acknowledge” or

⁶¹ Cho Hui-Wan, *Stick to the Name Taiwan Knows*, Taipei Times, 24 October 2003, p. A8.

⁶² Nadia Tsao, “Customs Territory” is nixed by Clinton, Taipei Times, 8 September 2000, p. A1.

⁶³ See *ibid.* (“US Senator Jon Kyl, along with 30 other senators, wrote President Clinton to urge the administration to reject China’s demand and President Bill Clinton indicated that the US would not accept Beijing’s proposal to label Taiwan as a ‘customs territory of China’ in WTO documents.”).

⁶⁴ *Taiwan’s WTO Status Unchanged, Representative Says*, Taiwan News, 27 May 2004, Global News Wire-Asia Africa Intelligence Wire; see also Laurence Eyton, *Status Quo: Beijing, Taipei and the WTO*, Asia Times, 24 June 2003, at <<http://www.atimes.com/atimes/China/EF24Ad02.html>> (stating Supachai’s “three demands: that the title of Taiwan’s mission be changed to ‘office’, which is the title used by Hong Kong and Macau; that member of the Taiwan mission refrain from using the customary diplomatic titles and ranks; and that Taiwan refrain from using any words in WTO-related documents . . . that imply that Taiwan is a sovereign country”).

⁶⁵ *Taiwan-China Fight Delays Update of WTO Directory*, Taiwan Headlines, 3 June 2004, available at <<http://th.gio.gov.tw/list.cfm?class=Wto#>>.

⁶⁶ *The WTO Secretariat Changed the Document Procedure* (Chinese), 30 November 2003, available at <<http://www.epochtimes.com/gb/3/11/30/n420836.htm>>.

⁶⁷ *Id.*

⁶⁸ Tony Juan and Cho Hui-wan, *WTO Secretariat’s Demands Offbase*, Taipei Times, 10 June 2002, p. A8.

⁶⁹ See *ibid.* (“The minutes record, ‘The Council so agreed’. However, after the chairman made the above-mentioned statements on the status and title of the Chinese Taipei delegation, the record merely indicates, ‘The Council took note of the statement’”).

“respect”, has no significant legal implications. Foreign states deliberately chose these terms when referring to the PRC’s view that Taiwan is part of China.

In addition, WTO membership applications of both China and Taiwan were based on Article XII of the WTO Agreement. Pursuant to Article XII, “any States or customs territory . . . may accede this Agreement”.⁷⁰ It is clear that the WTO deems these two entities to possess same capacities and do not distinguish rights between them. The Explanatory Note of the WTO Agreement, which provides that “the terms ‘country’ or ‘countries’ . . . include separate customs territory Members”, supports this position. This conclusion also reflects the traditional view that WTO law, indifferent to the definition of states, is only concerned with government capacity. As most Members use the titles of “permanent missions”, Taiwan, which has the same government capacity as other Members, is entitled to equal treatment.

Another relevant question is whether or not the head of Taiwan’s delegation can use official diplomatic ranks such as “ambassador” or “counsellor” in addition to the formal WTO title of “representative”. WTO law provides no guidance. Because Taiwan and Switzerland, where the WTO Secretariat sits, have no formal relations, Taiwan’s diplomats are not entitled to use diplomatic titles. In practice, nonetheless, most Members address Taiwan’s WTO representative as ambassador.

III. REASONS FOR JOINING THE WTO

A. TO EXPAND SUBSTANTIVE DIPLOMATIC RELATIONS

The ROC has been diplomatically isolated since it lost its United Nations seat in 1971. China, based on its version of the “one China” principle, has vigorously opposed Taiwan’s efforts to develop diplomatic relations or to join international organizations. Therefore, “Taiwan’s survival depends on, for the time being, preserving the ambiguity of its status”.⁷¹ As to relations with foreign states, the PRC has consistently rejected “dual recognition”, compelling foreign states to choose between the PRC and the ROC. Similarly, many international organizations have faced the “two Chinas” dilemma. Most international organizations decided to follow the “Olympic Formula”, i.e., preserving or accepting Taiwan’s membership with its name changing from “the Republic of China” to “Chinese Taipei”.⁷² The GATT and the WTO also followed this “custom”.

Although Taiwan has active “non-official” and “commercial” relations with major countries, its “invisibility” in the international arena led to lack of official

⁷⁰ WTO Agreement Article XII.

⁷¹ Gary Klintworth, *New Taiwan, New China: Taiwan’s Changing Role in the Asia-Pacific Region 20* (Sydney: Longman, 1995), p. 20.

⁷² Gerald Chan, *China and International Organizations: Participation in Non-Governmental Organizations Since 1971* (New York: Oxford University Press, 1989), p. 44 (“[T]aiwan Olympic committee of Taiwan would be named the ‘Chinese Taipei Olympic Committee’. Its anthem, flag, and emblem would have to be changed . . .”).

communication with foreign governments. While it is true that the WTO is not a political organization in essence, it does provide a forum in which Taiwan can efficiently exchange economic, and even political opinions, with other Members. Therefore, the ROC government's efforts to accede to the WTO were primarily driven by this political consideration.

In 2004, to safeguard its agricultural interests, Taiwan joined the G-10 Group, which consists of ten major food-importing economies, aimed at the common goal for agricultural negotiations in Doha Round trade talks.⁷³ For this reason, Taiwan's Council of Agriculture Chairman Lee Ching-lung was invited to attend a G-10 Group agricultural ministers' meeting on 5 July 2004, which was presided over by Swiss President Joseph Deiss.⁷⁴ The G-10 Group would also hold consultation meetings with food-exporting economies such as the United States, the European Union, the G-20 Group of developed nations and a 42-developing country "Special Products Union".⁷⁵ Having a similar opportunity to negotiate with major countries was a "mission impossible" for Taiwan in the past, but now the WTO enables Taiwan to play a "key minority" role and to step out of its diplomatic isolation.

B. TO SECURE PREFERENTIAL TREATMENT IN FOREIGN MARKETS

Taiwan's WTO membership can reinforce its rights to receive unconditional most-favoured-nation (MFN) treatment and national treatment. The MFN treatment, set forth in Article I of the GATT, requires that all members should be granted such status. National treatment, based on Article III, requires import countries accord no less favourable treatment to products from other countries than like products produced domestically. Therefore, foreign states cannot use discriminatory, or unfair, trade practices to prevent Taiwanese products from entering their market. This protection is particularly important to a trade-oriented nation such as Taiwan.

After Taiwan's withdrawal in 1950, the nation, as a non-contracting party, still enjoyed the MFN status and tariff-deductions through the United States based on the bilateral 1948 Treaty of Friendship, Commerce, and Navigation.⁷⁶ Taiwan's trade dependency on the US market rose rapidly from 53.1 percent in 1970 to 74.3 percent in 1990.⁷⁷ During the same period, exports to the United States accounted for approximately 40 percent of Taiwan's exports and 20 percent of Taiwan's GDP.⁷⁸ The

⁷³ C.H. Lu and P.C. Tang, *Taiwan Invited to Attend G-10 Group Ministerial Meeting*, Central News Agency (Taiwan), 25 June 2004, available at Lexis, News Library, Allasi File; Neil Lu and P.C. Tang, *Taiwan and G-10 Group Members to Hope Talks with major WTO Members*, Central News Agency (Taiwan), 23 March 2004, available at Lexis, News Library, Allasi File.

⁷⁴ Id.

⁷⁵ Id.

⁷⁶ Cho, as note 47 above, p. 77; see also *ibid.*, p. 77 (discussing that according to the Taiwan Relations Act 1979, the treaty was still valid in US law).

⁷⁷ Table 5.1 Trade Dependence of Taiwan and the United States, 1970–1990; *ibid.*, p. 82.

⁷⁸ Table 5.2 Ratio of Bilateral Trade and Exports to GNP and Total Exports, 1970–1990 (Percentage); *ibid.*, p. 83.

EEC became Taiwan's second largest export market in 1988.⁷⁹ As Taiwan had great trade surpluses with both the United States and the EU, these two parties frequently used the threat of restrictions of their markets as a bargaining ploy during trade negotiations.⁸⁰ After Taiwan's entry to the WTO, WTO law will guarantee Taiwan's access to its export markets.

C. TO HAVE ACCESS TO THE WTO DISPUTE RESOLUTION MECHANISM

As a WTO Member, Taiwan will obtain access to the WTO dispute resolution mechanism, which is widely recognized as "a central element in providing security and predictability to the multilateral trading system".⁸¹ Dispute resolution procedures are set forth in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). Should any country, such as Taiwan, consider its rights under the WTO to be infringed, its government is entitled to ask the infringing party to "accord sympathetic consideration" and "afford adequate for consultation".⁸² Furthermore, a complaining party can request to establish a Panel⁸³ to deal with trade disputes and can further appeal the Panel's decision to the Appellate Body.⁸⁴ The winning party is to be granted "authorization to suspend concessions or other obligations" against the losing party.⁸⁵ Because of the WTO's compulsory jurisdiction and effective implementation, commentators frequently refer the WTO dispute resolution mechanism as the "world trade court".⁸⁶

Prior to Taiwan's accession to the WTO, most countries afforded Taiwan's products similar treatment as those products from other countries. However, such treatment was based on "international comity", rather than legal obligation. The fact that these countries were able to alter or terminate such treatment unilaterally would severely affect export-oriented countries, such as Taiwan. The following example is illustrative. In 1999, Argentina and Poland unilaterally adopted import-limited measures against some of Taiwan's textile products.⁸⁷ Upon entry to the WTO,

⁷⁹ Ibid., p. 86.

⁸⁰ See *ibid.*, p. 88 ("Under US pressure, the ROC government further opened its domestic market exclusively for American oranges, grapefruit, grapes, pears, peaches, and tobacco, as well as banking and insurance services . . . [T]he EEC followed the US pattern of negotiation with Taiwan; it threatened to withdraw favorable treatment or unilaterally impose import restrictions . . .").

⁸¹ Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Agreement, Annex 2, 15 April 1994, Article 3.2, 33 I.L.M. 1226 (1994) (hereinafter DSU).

⁸² DSU Article 4.2.

⁸³ See DSU Article 6.1 ("If the complaining party so requests, a panel shall be established at the last at the DSB meeting . . . unless at that meeting the DSB decides by consensus not to establish a panel").

⁸⁴ DSU Article 17.

⁸⁵ DSU Article 22.1; see Jackson, as note 2 above, p. 266 ("In this practice, the DSU modifies past GATT practice. Article XXIII permitted the losing party to authorize the prevailing party to retaliate if the losing party ends its violation of GATT rules. Such authorization was granted only once, however . . .").

⁸⁶ E.g., John A. Ragosta, *Unmasking the WTO—Access to the DSB System: Can the WTO DSB Live up to the Moniker "World Trade Court"?*, 31 L. & Pol'y Int'l Bus. (2000), p. 766; John Ragosta et. al., *WTO Dispute Settlement: The System is Flawed and Must be Fixed*, 37 Int'l Lawyer (2000), p. 697.

⁸⁷ *Annual Review on Taiwan's Accession to the WTO and Prospects*, Ministry of Foreign Affairs, available at <<http://www.mofa.gov.tw/fp.asp?xItem=10680&ctnode=292>> (last visited 30 July 2004).

Taiwan requested that according to WTO law, these two countries either cancel such measures or propose a gradual termination plan in six months.⁸⁸ Both Argentina and Poland, understanding that their policies are repugnant to WTO law and would only benefit them temporarily, formally notified Taiwan of their decisions that such measures would be terminated by 2002.⁸⁹

Realizing the importance of understanding the law and practice of the WTO dispute resolution procedure, the Taiwan government has increasingly participated in dispute proceedings. For instance, as of January 2004, Taiwan has taken part in 12 trade dispute settlement cases as a third party, including those involving WTO Members accusing the United States of flouting global trade rules by adopting safeguard measures on imports of certain steel products.⁹⁰

IV. CROSS-STRAIT TRADE RELATIONS

Trade relations between Taiwan and China virtually did not exist for two decades after the ROC government relocated to Taiwan following the civil war in 1949. Due to Taiwan's restrictions, direct trade with China has been illegal in Taiwan. Nonetheless, beginning in the 1980s, indirect cross-strait trade, usually through Hong Kong or Japan, began rising rapidly.⁹¹ Between 1985 and 2003, the value of total trade between Taiwan and China increased by 420 percent, jumping from US\$ 1.1 billion to US\$ 46.3 billion.⁹² Ironically, these two political rivals became crucial trade partners with each other. For China, Taiwan is the third largest origin of foreign capital, preceded by Hong Kong and the United States.

The Chinese market became even more important to Taiwanese firms. China became Taiwan's number one source of trade surplus.⁹³ From 1991 to 2003, the Investment Commission of the ROC Ministry of Affairs approved 31,151 cases of Taiwan companies' investments in China with a total value of US\$ 34.3 billion.⁹⁴ In 2004, China absorbed approximately 50 percent of Taiwan's outbound capital flow.⁹⁵

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ C.H. Lu and P.C. Tang, *Taiwan Actively Preparing to Deal with Possible Trade Disputes in WTO*, Central News Agency (Taiwan), 5 January 2004, available at Lexis, News Library, Allasi File.

⁹¹ Shin-Yi Peng, *Economic Relations Between Taiwan and Southeast Asia: A Review of Taiwan's "Go South" Policy*, 16 Wis. Int'l L.J. (2003), pp. 639, 641 ("In March 1995, Hong Kong replaced the United States as Taiwan's largest single export destination. Of course, Hong Kong is not the true end destination. Of all Taiwan's exports to Hong Kong about 90% go on to Mainland China").

⁹² Table 6 Estimation of Trade between Taiwan and Mainland China, Mainland Affairs Council, available at <www.mac.gov.tw/big5/statistic/em/145/6.pdf> (10 March 2005).

⁹³ *A Brief Introduction to Taiwan: Taiwan-China Relations*, at <http://www.roc-taiwan.org/taiwan/5-gp/brief/info04_5.html> (11 August 2004).

⁹⁴ Table 10 Taiwan Investment in Mainland China, Mainland Affairs Council, available at <www.mac.gov.tw/big5/statistic/em/145/10.pdf> (10 March 2005).

⁹⁵ Table 13 Taiwan Approved Outward Investment by Country (Area), Mainland Affairs Council, available at <www.mac.gov.tw/big5/statistic/em/145/13.pdf> (10 March 2005).

Taiwan's export dependency on China stood at 25.8 percent,⁹⁶ making Taiwan the country with the highest trade dependency on China.⁹⁷

Given the complex relations between China and Taiwan, cross-strait trade relations are not purely economic, but are intertwined with politics. Both sides see cross-strait relations as a bargaining power to leverage their political goals. As neither China nor Taiwan invoked the Article XIII non-application clause of the WTO Agreement⁹⁸ prior to entry into the WTO, which requested trade agreements not to apply to bilateral relations, WTO membership for China and Taiwan will inevitably change cross-strait trade relations. Taiwan's WTO obligations will require the country to substantially revise its current laws restricting cross-strait trade, according China non-discriminatory treatment in compliance with the MFN principle of the WTO. Whether Taiwan can see China as normal trade partner remains to be seen.

A. CHINA'S TRADE POLICY ON TAIWAN

China's policy on Taiwan changed from "armed liberation" to "peaceful reunification" in the 1980s.⁹⁹ Chinese leaders demanded that Taiwan lift cross-strait trade barriers and called for immediate "three links" including direct trade, shipping transportation, and postal services. China's policy serves a twofold purpose. First, the policy is beneficial to China's economic reform because China can receive Taiwan's foreign capital and Taiwan's investment can help China increase domestic employment and develop export industries. Second, increasing economic interactions with China will make Taiwan dependent on the Chinese market, giving China more leverage in achieving its reunification goal. For instance, the Chinese government claimed to adopt retaliatory actions against Taiwan's "green businessmen" who have investments in China, yet support Taiwan independence.¹⁰⁰ Chinese scholars also suggested that China's economic sanctions against Taiwan can paralyse Taiwan's economy.

⁹⁶ Pei-Jun Tang, *2004 Taiwan's Trade Dependency on China—25.8%* (in Chinese), 17 March 2005, available at <<http://news.yam.com/cna/fn/200503/20050317563149.html>>.

⁹⁷ *Taiwan's Trade Dependency on Mainland China is the Highest in the World* (in Chinese) (4 December 2003), at <<http://jczs.sina.com.cn/2003-12-04/168434.html>>.

⁹⁸ See WTO Agreement Article XIII, sec. 1 ("This Agreement and the Multilateral Trade Agreements in Annexes 1 and 2 shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application."); Ma, as note 17 above (detailing possible consequences should Taiwan invoke Article XIII prior to its accession to the WTO).

⁹⁹ The significant policy change from Mao Zedong's "liberating Taiwan with military means" was first signalled by Ye Jianying's "Message to Compatriot in Taiwan" in 1979. The new policy also served as the basis of Deng Xiaoping's "one country, two systems" formula. Jiang Zemin's eight-point statement in 1995 reiterated the policy, calling for "promot[ing] economic cooperation between the two sides and avoid[ing] politics interfering with economic affairs". Tse-Kang Leng, *The Taiwan-China Connection: Democracy and Development Across the Taiwan Straits* (Boulder, CO: Westview, 1996), pp. 38–41; Gang Lin, "The Changing Relations across the Taiwan Strait", in Xiaobing Li et al. (eds), *Interpreting US-China-Taiwan Relations: China in the Post-Cold War Era* (Lanham, MD: University Press of America, 1998), pp. 128–129.

¹⁰⁰ See *Taipei Warns Beijing against Economic Bans*, China Post, 5 June 2004, available at Lexis, News Library, Allasi File (reporting that the Chinese government "does not welcome Taiwan companies that support the Taiwan independence movement. The overseas edition of the People's Daily subsequently named Chi Mei Group chairman Shi Wen-long as a 'green Taiwan businessman' because of his close ties with President Chen Shui-bian, who is concurrently DPP chairman").

In 1988, for the economic and political ends, China's State Council promulgated the Regulations for Encouraging Investment by Taiwan Compatriots, which granted Taiwan enterprises preferential treatment, including tax deduction and exemption. In 1994, the National People's Congress passed the Taiwan Compatriot Investment Protection Law. Furthermore, each province or city has authority to enact more specific regulations to attract Taiwan enterprises.

Most provisions in the forgoing laws are parallel to those laws that govern foreign enterprises. Lacking detailed regulations on procedural requirements, Taiwanese and foreign enterprises are vulnerable to changes of policies or "internal regulations" of governments at different levels. For instance, both Article 4 of the Taiwan Compatriot Investment Protection Law and Article 5 of the Wholly Foreign Owned Enterprise Law provide that China "shall not nationalize or requisition" enterprises with Taiwan or foreign capital.¹⁰¹ Yet, the protection is subject to "special circumstances" or the need of "public interests".¹⁰² Chinese law provides no guidance on the legal procedures or the definitions as to these vague provisions.

It is also noteworthy that China's trade measures on Taiwan are premised on political considerations. For instance, Article 6 of the Trade Management Regulation on the Taiwan Area provides that "Taiwan-related contracts and goods shall not contain words or symbols in violation of the one China principle".¹⁰³ Furthermore, Chinese courts do not extend mutual recognition to Taiwan's judgments or arbitral decisions. All verdicts from Taiwan courts are required to be "politically investigated" before Chinese courts accept their validity.¹⁰⁴ Not until July 2004, did a Chinese court, the Xiamen Intermediate People's Court, recognize and executed Taiwan's arbitral decision.¹⁰⁵

B. TAIWAN'S TRADE POLICY ON CHINA

From 1949, the "three No's policy", i.e., no contact, no negotiation and no compromise, formed the basis of Taiwan's China policy. In 1987, the government

¹⁰¹ See Article 4, Taiwan Compatriot Investment Protection Law, available at <<http://www.chinataiwan.org/web/webportal/W5029558/A5037494.html>> ("The State shall not nationalize or requisition the investment made by investors who are Taiwan compatriots; under special circumstances and on the basis of the need of public interests, the State may in accordance with legal procedures requisition the investments made by investors who are Taiwan compatriots and make appropriate compensations thereto."); Article 5, Wholly Foreign Owned Enterprise Law, available at <<http://www.qis.net/chinalaw/prclaw12.htm>> ("The state shall not nationalize or requisition any enterprise with foreign capital. Under special circumstances, when public interest requires, enterprises with foreign capital may be requisitioned by legal procedures and appropriate compensation shall be made.").

¹⁰² *Id.*

¹⁰³ Article 6, Trade Management Regulation on the Taiwan Area (in Chinese), available at <<http://tw.people.com.cn/BIG5/14866/14928/866911.html>>.

¹⁰⁴ This regulation is set forth in Article 4 of the Regulations Governing Recognition by the People's Court of Civil Judgments Rendered by the Taiwan Courts. Li Jui-wen, *Mainland Courts Recognize Taiwan Arbitral Decision for the First Time*, 78 Exchange (December 2004), p. 59; See *ibid.*, p. 59 ("Taiwan began recognizing and executing mainland's civil conclusive judgments and civil arbitral decisions in 1992, when the [Act governing Relations between the Peoples of the Taiwan and Mainland Areas was drafted."].

¹⁰⁵ See *ibid.* (stating that the case was decided by Taiwan's Chinese Arbitration Association and because assets of the losing defendant are located in China, the plaintiff submitted the decision to the Chinese court).

lifted the ban on Taiwanese residents visiting China and removed the Central Bank's approval for outbound capital below US\$ 5 million.¹⁰⁶ As a result, indirect trade with China was permitted for the first time. Around the same time, Taiwan's drastic currency appreciation, along with the increasing costs of land and labour, greatly undermined the competitiveness of Taiwan's manufacturing. Moreover, China's preferential treatment to foreign investors, its similarities in language and culture, and low labour cost made China an ideal location for Taiwan's labour-intensive and export-oriented companies. For these reasons, Taiwanese enterprises shifted sharply to China.¹⁰⁷

Worrying that continuing economic links with China will "hollow out" Taiwan's industries and increase China's political leverage, the Taiwan government launched the "no haste, be patient" policy in the 1990s. To diversify outbound capital and reduce political risks, the policy aimed at capping investments in China and encouraging investments in Southeast Asian countries.¹⁰⁸ Political forum intensely debated the issue of "Go South" or "Go West" in terms of the country's outbound investment.¹⁰⁹ Empirical studies show that the policy failed to achieve its goals.¹¹⁰ After 1995, the value of cross-strait trade grew at increasing speed and China, replacing the United States, became Taiwan's most crucial export country.¹¹¹ China's export products, many of which were made by Taiwan invested factories, began becoming Taiwan's manufacturers' competitors in the international market.¹¹² China's Taiwan companies also began localizing their purchase instead of importing raw materials and semi-finished products from Taiwan.¹¹³ The WTO law will inevitably intensify Taiwan's trade dependency on China, since trade barriers imposed by the Taiwan government will need to be dismantled.

¹⁰⁶ Barry Naughton (ed.), *The China Circle: Economics and Electronic in the PRC, Taiwan, and Hong Kong* (Washington, D.C.: Brookings Institution Press, 1997), p. 102.

¹⁰⁷ See, e.g., Klintworth, as note 71 above, p. 147 ("Most of Taiwan's cement makers have also gone offshore—it was a matter of survival' ... Formosa Plastics ... was investing in the mainland because 'intensified competition made it necessary' ... Taiwan's camera makers were forced to build factories in China to try to maintain their competitive edge ...").

¹⁰⁸ Lee J. Brenner, *The Effect of China's WTO Accession on Taiwan*, available at <www.Leejbrenner.com/The_Effect_of_China's_WTO_.html> (last visited 29 July 2004) (discussing that Taiwan banned "investment in PRC infrastructure, high-technology industries, and the energy and service sectors, requiring investments over \$5 million to be licensed and capping individual projects at \$50 million").

¹⁰⁹ See Peng, as note 91 above, p. 644 ("In 1995, 'Go West' or 'Go South' became the controversial issues during the pre-election presidential candidate debate held by the Democracy Progressive Party. Min-min Peng, the 'godfather' of Taiwan independence, objected to continued strengthening of economic ties with China for political reasons.").

¹¹⁰ See Table 6 Estimation of Trade between Taiwan and Mainland China, Mainland Affairs Council, available at <www.mac.gov.tw/big5/statistic/em/145/6.pdf> (10 March 2005) (showing that cross-strait trade increased from US\$ 5.1 billion in 1990 to US\$ 31.2 billion in 2000).

¹¹¹ Wei-Bin Zhang, *Taiwan's Modernization: Americanization and Modernizing Confucian Manifestations* (Singapore: World Scientific, 2003), p. 156.

¹¹² Rong-I Wu, *Taiwan's Future Economic Place in the World*, available at <www.csis.org/asia/events/020206wu.pdf> (6 February 2002) ("[T]he pattern of industrial relationship between the two economies has gradually transformed from 'vertical division of labor' to 'horizontal competition' ... In 2000, China's total IT exports amounted to \$37 billion, of which 72% was generated by the Taiwanese IT firms.").

¹¹³ Wei-Wei Zhang, "The Concept of 'Greater China'", in Fu-Kuo Liu and Philippe Regnier (eds), *Regionalism in East Asia: Paradigm Shifting* 166 (London: Routledge Curzon, 2003), p. 166.

Common business interests with China gradually shape Taiwan's China policy. Taiwan's new president Chen Shui-bian departed from the KMT's traditional policy of opposing the PRC's participation in international settings. He called upon the United States to grant China's Permanent Normal Trade Relations (PNTR) in order to expedite WTO accession for China and Taiwan.¹¹⁴ In addition, because a large number of Taiwan export enterprises have relocated to China, the absence of preferential market access to the US market for China will have a negative impact on Taiwan companies' competitiveness, indirectly undermining Taiwan's economic growth. Since 2000, Taiwan replaced the "no haste, be patient" policy with the principle of "proactive liberalization with effective management".¹¹⁵

Taiwan's China policy is based on the Guidelines for National Reunification, enacted by the Executive Yuan (Cabinet) in 1991. The Guidelines adopted a three-phase approach toward reunification. Because cross-strait relations have not met the conditions set forth in the second phrase, "direct postal, transport and commercial links" are not permitted.¹¹⁶ Thus, to regulate cross-strait activities, the government in 1992 promulgated the Act Governing Relations between Peoples of the Taiwan Area and the Mainland Area (Cross-Strait Act), which laid the foundation of all laws and regulations pertaining to China.

C. WTO IMPLICATIONS

World Trade Organization rules require that both China and Taiwan establish normal trade relations in compliance with their international obligations. On the China side, the WTO's impact on the trade policy on Taiwan is relatively minimal. Some called Taiwan enterprises' preferential treatment for investments and lower tariffs rate "super-national-treatment". Nonetheless, the WTO's most-favoured-nation principle will mandate the gradual easing of such treatment or extend such privileges to other WTO Members. In fact, China's continuing reduction of overall tariff rates and non-tariff barriers has largely narrowed the competitiveness between foreign companies and Taiwan companies.¹¹⁷ Presumably, China's policy to reduce economic privileges of Taiwanese businesses also pressures the Taiwanese government to resume bilateral negotiations on the premise of the "one China" principle should it intend to maintain its nationals' preferential treatment on the mainland.

¹¹⁴ See Brenner, as note 108 above ("Although US policy does not link admission of Taiwan to a successful application by China, most members of the WTO have accepted the idea that Taiwan will not gain entry until China is admitted.")

¹¹⁵ Taiwan Yearbook 2004, *Taiwan-China Relations*, available at <<http://www.gio.gov.tw/taiwan-website/5-gp/yearbook/P087.htm>> (last visited 18 March 2005).

¹¹⁶ The second phrase conditions in the Guidelines include both sides' "official communication channels on equal footing", "taking part in international organizations and activities", and "[m]utual visits by high-ranking officials". Guidelines for National Unification, 14 March 1991, available at <http://www.president.gov.tw/2_special/unification>.

¹¹⁷ Peng, as note 91 above, pp. 641–642.

Compared to China, Taiwan's WTO membership will have a greater impact on its discriminatory measures against China. In my view, Taiwan will need to revise incompatible laws in compliance with WTO law unless invoking safeguard measures or other WTO exceptions.¹¹⁸ Below I consider Taiwan's current laws that conflict with WTO requirements.

1. *Trade in Goods*

The golden rule of the Cross-Strait Act is Article 35, which provides that engaging in trade with China is subject to the government's approval.¹¹⁹ Pursuant to this provision, the government further requires that all goods involved in cross-strait trade "shall be transshipped via third territories or the off-shore shipping center".¹²⁰ In other words, direct importation or exportation of goods between China and Taiwan is prohibited. Taiwan's discriminatory laws against such goods are contrary to Article I of the GATT, which stipulates that "all rules and formalities in connection with importation and exportation" should comply with the MFN principle.¹²¹

Taiwan's discrimination against imports from China is because of its fear that rapid inflow of Chinese goods may turn Taiwan's trade surplus to trade deficit. Beginning in 1988, Taiwan began gradually permitting goods produced in China, from raw materials to finished products, to enter Taiwan.¹²² Considering Chinese agricultural products' low cost and the potential impact on domestic agriculture, the government adopted the "positive list" for the import of agricultural goods from China.¹²³ Only listed agricultural items were allowed to enter the domestic market. In addition, the government adopted the "positive list" to govern the import of industrial goods because such goods could enhance the competitiveness of Taiwan's export products. These measures were replaced in April 1998 by the "ROC Classification List for Import and Export Goods" and the "List of Mainland Permitted Items".¹²⁴ Based on the principles of "national security" and the "serious negative impact on related domestic industries",¹²⁵ Taiwan's Bureau of Foreign Trade has periodically reviewed the lists. In reality, controversies regarding import permissions frequently occurred because the Bureau set no clear standards on "serious negative impact".

¹¹⁸ See, e.g., GATT Article XXI ("Nothing in this Agreement shall be construed ... to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests ...").

¹¹⁹ See Article 35, Cross-Strait Act ("Any individual, juristic person, organization, or other institution of the Taiwan Area may be permitted by the competent authorities to engage in the trade between the Taiwan Area and the Mainland Area ...").

¹²⁰ Article 5, Regulations Governing Permissions of Trade Between Taiwan Area and Mainland Area, available at <www.mac.gov.tw/english/english/law/en09.pdf> (hereinafter Cross-Strait Trade Regulations).

¹²¹ GATT Article I.

¹²² *Introduction to Management of the Import of Mainland Products* (in Chinese), Ministry of Economic Affairs, 8 March 2003, available at <ekm92.trade.gov.tw/BOFT/OpenFileService2>.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Article 8, Cross-Strait Trade Regulations.

The government, as of March 2005, has permitted 2,359 agricultural products and 8,643 industrial items produced in China.¹²⁶ However, contrary to the MFN principle, Taiwan excludes numerous categories of Chinese goods, but allows the import of like products from other countries. Although this practice is presumably contrary to Article XI of the GATT requiring elimination of quantitative restrictions,¹²⁷ China will unlikely take any action against Taiwan under the WTO because doing so will confer *de facto* equal status on Taiwan.

2. Trade in Services

While commercial services currently account for 20 percent of total trade, they represent 60 percent of employment and production¹²⁸ and amount to more than US\$ 1.4 trillion.¹²⁹ The Uruguay Round first brought services under multinational disciplines in the General Agreements on Trade in Services (GATS), which came into effect in January 1995. Similar to the GATT, the GATS also upholds principles, such as MFN and national treatment. Article II sets forth the MFN principle for market access, requiring that all WTO Members grant equal treatment to all “services and services suppliers” from other Members.¹³⁰ Nonetheless, distinguishing from the GATT, the MFN principle of the GATS permits “exemptions”,¹³¹ which must be listed by a Member on its MFN Exemptions List should it decide not to grant similar privileges to certain Members. Furthermore, each Member must submit a Schedule of Specific Commitments that lists services sectors “for which the Member guarantees market access and national treatment and any limitations that may be attached”.¹³²

Given the foregoing operations of the GATS, what is crucial to a Member’s obligations are the attached MFN Exemptions List and the Schedule of Specific Commitments, rather than the Agreement itself. As Taiwan did not exclude China from its MFN Exemptions List, the country is required to accord equal services treatment to China according to its Schedule of Specific Commitments. Three major aspects should be noted.

¹²⁶ *The List of Mainland’s Permitted Agricultural and Industrial Goods* (in Chinese), Ministry of Economic Affairs, 8 March 2003, available at <ekm92.trade.gov.tw/BOFT/OpenFileService2>.

¹²⁷ See GATT Article XI (“No Prohibition or restrictions ... whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained ...”).

¹²⁸ The General Agreement on Trade in Services (GATS): Objectives, Coverage and Disciplines, at <http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm> (last visited 20 March 2005).

¹²⁹ Jackson, as note 2 above, p. 853.

¹³⁰ See General Agreement on Trade in Services, 15 April 1994, Article II, sec. 1, Marrakesh Agreement Establishing the WTO, Annex 1B, Legal Instruments—Results of the Uruguay Round, vol. 31, 33 I.L.M. 142 (1994) (hereinafter GATS) (“[E]ach member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country.”).

¹³¹ GATT Article II, sec. 2. See also GATS, as note 8 above (“All exemptions are subject to review; they should in principle not last longer than 10 years.”).

¹³² GATS, as note 128 above. Each Member is required to list four modes of supply in the Schedule: 1) Cross-border supply, 2) Consumption abroad, 3) Commercial presence, 4) Presence of natural persons.

First, legal questions may arise pertaining to services-related investments. Taiwan guaranteed that subject to some ceiling limitations as to the percentage of foreign capital in certain industries,¹³³ “foreign business and persons may directly invest” in Taiwan.¹³⁴ Yet, contrary to the MFN, Taiwan requires that investments from Chinese counterparts and even companies with Chinese capital in any third area be prohibited unless permitted by the government.¹³⁵ Like the MFN principle of GATT Article I, which governs “rules or formalities” relating to “importation and exportation”,¹³⁶ the MFN principle of GATS Article II governs trade measures related to “services and services suppliers”.¹³⁷ Consequently, Taiwan’s restrictions on Taiwanese companies’ investments in China may constitute a violation under the GATS. In order to gradually conform to the GATS, Taiwan recently rescinded the regulations, restricting maximum investments in China to US\$ 50 million and to 40 percent of Taiwan companies’ capital.¹³⁸

Second, the Cross-Strait Act’s provisions provide that unless permitted, no “vessels, aircraft or other means of transportation” can “sail or fly” between China and Taiwan.¹³⁹ Some aspects of these provisions are incompatible with the MFN principle in Article II of the GATS. Currently, Taiwan does not permit regular direct air flights between China and Taiwan, although *ad hoc* indirect chartered flights for the lunar new year were operated twice in 2003 and 2005 respectively. Therefore, most travellers flying to Taiwan or China have to transfer through Hong Kong or Macau, unavoidably increasing their travel time. However, Taiwan’s restrictions on cross-strait air transport services are unlikely to be challenged, since the GATS does not apply to measures as to “traffic rights” or “services directly related to the exercise of traffic rights”.¹⁴⁰

Taiwan’s restrictions on sea transport services are problematic. Currently, Taiwan prohibits direct cross-strait sea transport, with the exception of the “mini-three-links” which permit direct transportation between Chinese ports and Taiwan’s offshore islands of Kinmen and Matsu. Since the GATS is concerned with equal treatment as to

¹³³ See *Report of the Working Party on the Accession of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, 5 October 2001, available at <<http://docsonline.wto.org/DDFDocuments/t/WT/ACC/TPKM18A2.doc>> (hereinafter TPKM Report) (“Foreign business and individuals may directly invest in Chinese Taipei, unless otherwise falling into the measures of limitations specified in the specific sectors”).

¹³⁴ See, e.g., *ibid.* (“Direct investment by non-Chinese Taipei persons in a service supplier cannot exceed 20%, but the aggregate of direct and indirect investment by non-Chinese”).

¹³⁵ See Article 73, Cross-Strait Act (“Unless permitted by the competent authorities, any individual, juristic person, organization, or other institution of the Mainland Area, or any company it invests in any third area may not engage in any investment activity in the Taiwan Area.”). Taiwan’s Executive Yuan cancelled the 20 percent ceiling restriction in the 1993 revision.

¹³⁶ GATT Article I, sec. 1.

¹³⁷ GATS Article II, sec. 1.

¹³⁸ Tsering Namgyal, “*Dangerous Liaisons*” *Post-WTO Taiwan-China Economic Ties*, European Chamber of Commerce in Taipei, available at <www.ecct.com.tw/euroview/issue79/wto.php> (last visited 29 July 2004).

¹³⁹ See, e.g., Article 29, Cross-Strait Act (“Unless permitted by the competent authorities, no Mainland vessels, civil aircraft or other means of transportation may enter into the restricted or prohibited waters of the Taiwan Area or the controlled airspace of the Taipei Flight Information Region.”) These provisions apply to both foreign companies and companies from China or Taiwan.

¹⁴⁰ GATS Annex on Air Transport Services. Yet, the GATS apply to (a) aircraft repair and maintenance services; (b) the selling and marketing of air transport services; (c) computer reservation system (CRS) services. *Ibid.*

trade measures governing services and service suppliers, it applies to Taiwan's measures barring companies from operating sea transport services from Taiwan to China. As to services from China to Taiwan, Taiwan made a general reservation in its Schedule of Specific Commitments.¹⁴¹ Since 1997, Taiwan permitted cross-strait sea transport services between Chinese ports and Taiwan's offshore transshipment centres.¹⁴² Nonetheless, Taiwan only allowed foreign ships and ships under flags of convenience operated by companies from Taiwan and China. In other words, Taiwan's restrictions violate the MFN principle of Article II of the GATS by excluding vessels of Chinese nationality.

Finally, in its Schedule of Specific Commitments, Taiwan committed to permitting foreign business visitors to stay in the country up to 90 days and foreign intra-corporate transferees to stay up to three years.¹⁴³ Yet, the government imposed more burdensome procedural requirements for Chinese business visitors. For instance, their companies in Taiwan must apply for entry permissions on their behalf and the scope of companies is also limited.¹⁴⁴ In addition, these immigration restrictions serve as barriers deliberately preventing Chinese professionals, such as accountants and lawyers, from entering the Taiwan market. Consequently, these restrictions are repugnant to the MFN principle of the GATS and need to be further relaxed.

3. *Trade-Related Investment Measures*

Recognizing certain investment measures may lead to a negative impact on free trade, GATT contracting parties in the Uruguay Round concluded the Agreement on Trade-Related Investment Measures (TRIMs). It is worth mentioning that the TRIMs Agreement only applies to measures affecting trade in goods and not to those affecting trade in services. Thus, the Agreement is not concerned with Taiwan's restrictions on its companies' investments in China and Chinese companies' investments in Taiwan.

The purpose of the Agreement is to prohibit trade-related measures inconsistent with Article III (national treatment) and Article XI (quantitative restrictions) of the

¹⁴¹ See TPKM Report, as note 133 above ("Import and export of freight that has an origin of Chinese Taipei (7123**), excluding regular route freight transportation as currently defined in the Highway Law and those services currently specifically reserved to the Chinese Taipei's postal authorities by law").

¹⁴² Tsai Horng-ming, *Cast Aside Political Obstacles: Open up Direct Link Talks*, 76 Exchange (August 2004), p. 22 ("The vessels that come under [Taiwan's] offshore transshipment center's 'Offshore transshipment center establishment and work rules', are mainly foreign vessels operated by foreign companies, or companies from Taiwan or mainland China. Mainland China's 'Rules for the Management of Cross-Strait Shipping' for their part ... [exclude foreign ships, but permit] ships under flag of convenience [operated by companies of Taiwan or China] ...").

¹⁴³ TPKM Report, as note 133 above.

¹⁴⁴ *Permission Regulation on Mainland Chinese Entering Taiwan to Engage in Commercial Activities* (in Chinese), available at <www.mac.gov.tw/gb/gb/law/economy/103161.htm> (last visited 20 March 2005). See also Article 10, Cross-Strait Act ("No people of the Mainland Area may enter into the Taiwan Area without permission of the competent authorities.").

GATT.¹⁴⁵ As the Illustrative List of the Agreement shows, these measures may be domestic content requirements or limitations on investors' ability to import or export. As I find Taiwan's restrictions on the import of Chinese goods contrary to Article XI of the GATT in the previous section of Trade in Goods, these measures would be also incompatible with the TRIMs Agreement and need to be gradually eased.

V. DISPUTE RESOLUTION OF CROSS-STRAIT TRADE MATTERS

A fundamental question that arises in cross-strait relations is whether the WTO dispute resolution mechanism can solve bilateral trade conflicts. Despite the political hostility of their respective governments, trade activities between China and Taiwan increased rapidly. Nonetheless, no bilateral negotiations or the dispute resolution mechanisms exist between the two states. Both Taiwan and China established "unofficial" organizations under the aegis of government bodies to deal with each other. Representatives from Taiwan's Strait Exchange Foundation (SEF) and China's Association for Relations Across the Taiwan Strait (ARTS) held their first bilateral meeting in Singapore and concluded four agreements.¹⁴⁶ Nonetheless, China suspended bilateral talks in protest of former President Lee's "two-state theory".

A. POSSIBILITY OF USE OF THE WTO DISPUTE RESOLUTION MECHANISM

The purpose of the DSU is to preserve WTO Members' rights and obligations. After Taiwan and China joined the WTO, the WTO dispute resolution mechanism became equally available to both sides. Will China sue Taiwan for violating WTO rules by imposing discriminatory trade barriers against China? The answer may be "no". The PRC has considered cross-straits trade disputes as "internal affairs" and has been reluctant to negotiate with Taiwan and resolve cross-strait trade issues under the WTO.¹⁴⁷ China sees Taiwan's every move in the WTO as a means to prove its "statehood" and as a step toward independence. Thus, Lung Yongtu, the PRC's top trade negotiator, emphasized that China would not hold consultations with Taiwan

¹⁴⁵ Agreement on Trade-Related Investment Measures, 15 April 1994, Article 2, Marrakesh Agreement Establishing the WTO, Annex 1A, The Legal Texts—Results of the Uruguay Round of Multilateral Trade Negotiations, 143 (1999), 33 I.L.M. 1153 (1994) (hereinafter TRIMs).

¹⁴⁶ Zhang, as note 111 above, p. 155 (discussing the ARATS-SEF meeting); Wei-Wei Zhang, The Concept of 'Greater China' in Regionalism in East Asia: Paradigm Shifting 166 (Fu-Kuo Liu & Philippe Regnier ed. 2003) (same). Government agencies responsible for cross-strait issues are the Mainland Affairs Council (Taiwan) and the Taiwan Affairs Council (China). Both of them are at the ministerial level in two states.

¹⁴⁷ See, e.g., Qingjiang Kong, *Can the WTO Dispute Settlement Mechanism Resolve Trade Disputes Between China and Taiwan?*, 5 J. Int'l Econ. L. 3 (2002), pp. 747, 755 (discussing the statements of Tang Shubei, former Executive vice-president of the Association for Relations Across the Taiwan Strait, and Zhang Mingqing, spokesman for the Taiwan Affairs Office of the State Council, that the PRC opposes any attempt to discuss cross-strait economic and trade affairs under the WTO and does not intend to resort to the dispute resolution mechanism to resolve such matters).

unless the "one China" issue was solved.¹⁴⁸ Yet, as both Taiwan and China are full WTO Members, China's refusal to hold consultations with Taiwan would be contrary to Article 4 of the DSU. Taiwan would be entitled to further request the establishment of the panel under Article 6 of the DSU. Although China fears that a case arising between China and Taiwan may create the impression of "two countries", China cannot deny the WTO dispute resolution mechanism's compulsory jurisdiction.¹⁴⁹

On the Taiwan side, the government is motivated to include cross-strait trade issues into the WTO framework. First, it would be a great opportunity to show that the ROC and the PRC are on an equal status. The PRC in its propaganda often asserts that Taiwan joined the WTO as "China's" separate customs territory and Taiwan's status is indistinguishable from Hong Kong and Macau.¹⁵⁰ Furthermore, the "one country, four seats" arrangement consistent with the one China principle is what the WTO specially designed for China. While it is true that Taiwan did not accede to the WTO as a "state" member, Taiwan's accession history unambiguously proves that Taiwan is not part of the PRC. Thus, Taiwan's suit against China may buttress its political claim.

Second, as of 2003, China has signed 105 bilateral investment protection agreements with foreign countries.¹⁵¹ In the absence of an agreement with China, Taiwanese investors lack international protection for their investments. Therefore, Taiwan would likely use the WTO system to protect its business interests in China. Third, due to the suspension of cross-strait dialogues, the WTO may provide a new forum for both sides to negotiate. Commentators suggested that Taipei, Washington, D.C., and Beijing formed a triangle in the political arena. In my opinion, a new triangle in the trade circle is emerging among Taipei, Geneva, and Beijing.

B. CASES EXAMINATION: CROSS-STRAIT TRADE CONFLICTS

China might find it difficult to oppose interactions with Taiwan in the WTO. According to Article 18 of the Protocol on the Accession of the PRC, the WTO's subsidiary bodies should review China's implementation of its commitments annually.¹⁵² This process is called the Transitional Review Mechanism and will last ten years.¹⁵³ At the first review session in 2002, every country having substantial trade

¹⁴⁸ *Taiwan Calls for M'land China to Respect WTO Rules*, Central News Agency (Taiwan), 3 September 2002, available at Lexis, News Library, Allasi File.

¹⁴⁹ See John Shijian Mo, *Settlement of Trade Dispute between Mainland China and the Separate Customs Territory of Taiwan within the WTO*, 2 Chinese J. Int'l L. 1 (2003), pp. 145, 167 ("In fact, the 'One China' principle cannot deny the DSB's jurisdiction.").

¹⁵⁰ Cf. *ibid.*, p. 168 ("Being equal members with Mainland China in the WTO does not change the fact that Taiwan is part of China. This is the same relationships between China and Hong Kong or Macau . . .").

¹⁵¹ *China Hopes to Sign More Investment Protection Agreement with More Portuguese Countries*, People's Daily, 13 October 2003, available at <http://english.people.com.cn/200310/13/eng20031013_125858.shtml>.

¹⁵² Article 18, Protocol on the Accession of the People's Republic of China, available at <<http://law.people.com.cn/doc/26.doc>>.

¹⁵³ *Id.*

with China had questioned China regarding wide-ranging aspects.¹⁵⁴ Taiwan's mission also submitted ten written inquiries. Nonetheless, Chinese delegates either ambiguously answered Taiwan's questions or expressed that both sides should negotiate through bilateral channels. This very first interaction again showed China's reluctance to face Taiwan in the WTO.

In March 2002, China first launched an anti-dumping investigation on the cold-rolled steel sheet imported from Taiwan, along with Russia, Korea, and Kazakhstan.¹⁵⁵ This was the first cross-strait trade conflict after the WTO accession of Taiwan and China. Within a week, China started another anti-dumping investigation on polyvinyl chloride (PVC) imported from Taiwan, as well as the United States, Korea and Russia.¹⁵⁶ For both cases, China's Ministry of Foreign Trade and Economic Cooperation (MOFTEC) notified all governments of interested parties except Taiwan. Instead, China's steel and plastics industries informed their Taiwanese counterparts of these anti-dumping investigations. In my view, China's attempts to bypass the Taiwan government violated not only WTO law but also domestic law. According to Article 6 of the Agreement on Implementation of Article VI of the GATT 1994 (Anti-dumping Agreement), interested parties, including "the government of the exporting Member", should be "given notice of the information" in an anti-dumping investigation.¹⁵⁷ Furthermore, China's legal basis for anti-dumping investigations was the Anti-dumping Statute. Article 16 of the statute requires the MOFTEC to notify "the relevant governments of exporting countries (areas)" of its anti-dumping investigations.¹⁵⁸ The PRC violated these requirements guaranteeing the procedural due process by failing to notify the Taiwan government.

It is also interesting to note that China's anti-dumping investigation targeting Taiwan may be presumably in conflict with its "one China" principle. The enactment of the Anti-dumping Statute was based on the Foreign Trade Law. However, Article 43 of the Foreign Trade Law provides that the law "shall not apply to the separate customs territories of the People's Republic of China".¹⁵⁹ If China deems Taiwan its separate customs territory, why apply the Anti-dumping Statute to cross-strait trade matters?

In May 2002, China adopted provisional safeguard measures against imports of 48 steel products from Taiwan and took formal safeguard measures against five of the products.¹⁶⁰ Again, instead of notifying the Taiwan government of such measures,

¹⁵⁴ *Annual Review*, as note 87 above.

¹⁵⁵ *China Sets off Anti-dumping Investigation on Steel Products from Russia & ROK*, People's Daily, 27 March 2002, available at <http://english.people.com.cn/200203/27/eng20020327_92931.shtml>.

¹⁵⁶ Ministry of Commerce Notice No. 11, Xinhua News Agency, 13 May 2003, available at <http://news.xinhuanet.com/english/2003-05/13/content_1058245.htm>.

¹⁵⁷ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, 15 April 1994, Article 6, WTO Agreement, Annex 1A, Legal Instruments—Results of the Uruguay Round, vol. 1, 33 I.L.M. 1133 (1994).

¹⁵⁸ Anti-dumping Statute (in Chinese), available at <<http://www.people.com.cn/GB/paper464/4928/530400.html>>.

¹⁵⁹ Article 43, Foreign Trade Law, available at <<http://www.chinatoday.com/law/a07.htm>>.

¹⁶⁰ *Annual Review*, as note 87 above.

China only informed the Taiwan Iron and Steel Industries Association.¹⁶¹ Failure to inform the Taiwan government placed China in violation of the Safeguard Agreement. While it is legal for a WTO Member to “take a provisional safeguard measure”,¹⁶² the Member is required, according to Article 12 of the Safeguard Agreement, to notify “those Members having a substantial interest as exporters of the product concerned”.¹⁶³ In other words, China was obligated to notify the Taiwan government of the implementation of safeguard measures.

Upon Taiwan’s request to hold consultations on this matter, the PRC’s WTO mission replied to Taiwan’s Mission. However, in its correspondence China referred to Taiwan as an economic and trade office, not by its official title as the permanent mission. Taiwan promptly informed its Chinese counterpart that it had neither the obligation nor intention to sit down for talks until requested to do so in the appropriate manner.¹⁶⁴ As the PRC overcame its reluctance, news of the first official dialogue between Taiwan and China grabbed the attention of other WTO Members. The much-anticipated meeting was held on 12 December 2002.¹⁶⁵ Despite its failure to arrive at a substantive conclusion, the meeting opened a gate for future interactions.

VI. CONCLUSION

As a non-recognized state, Taiwan’s accession into the WTO is a major diplomatic and economic breakthrough; this is especially true since it was ousted from the United Nations and its affiliated organizations in the 1970s. The PRC, based on its “one China” principle, had consistently opposed Taiwan’s application for its GATT and WTO memberships. The Article found the PRC’s claim that accession procedures applying to Taiwan and Hong Kong should be identical erroneous because, under international trade law, the ROC is the automatic government acting “on behalf of” Taiwan and thus does not need the PRC’s “sponsorship”. Taiwan’s successful entry into the WTO indicates the validity of this position, although its membership as a “separate customs territory”, rather than as a “state”, reflects that it had to accede to a political compromise, albeit reluctantly.

Coexistence of China and Taiwan makes the WTO a new diplomatic battle. China continuously downgrades Taiwan’s status to avoid the impression of “two countries”, whereas Taiwan attempts to “internationalize”, or “politicize” the cross-strait trade issues to prove its autonomy and separate itself from China. Having examined the domestic trade laws and policies of China and Taiwan, this Article suggested that Taiwan’s current trade barriers against China, such as the indirect “three

¹⁶¹ *Id.*

¹⁶² Agreement on Safeguards, 15 April 1994, Article 5, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154 (1994).

¹⁶³ *Ibid.*, Article 12.

¹⁶⁴ Eyton, as note 64 above.

¹⁶⁵ *Annual Review*, as note 87 above.

links", may constitute violations of numerous trade agreements and need to be revised. In addition, China's "one China" principle, which deems cross-strait trade conflicts as domestic affairs, is unlikely to trump the compulsory jurisdiction of the WTO Dispute Resolution Mechanism.

In conclusion, under the WTO framework, both China and Taiwan should abide by WTO law and treat the other as an equal trade partner. The WTO provides opportunity for facilitating cross-strait dialogues, and increasingly intensified economic relations may lead to political integration. At the same time, the WTO also brings challenge to both states since immense trade flows from the other side may be detrimental to domestic industries, and resorting to the WTO Dispute Resolution Mechanism may worsen bilateral political ties. Both China-Taiwan relations and the WTO's development are changing rapidly. The only predicable thing is unpredictability.